IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MONTGOMERY CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOURGHOET,
Respondent.

MARTINEZ M.,
Petitioner,

v.

JACQUELINE BOURGHOET,
Respondent.

On Writs of Certiorari to the Maryland Court of Appeals

BRIEF OF
CHILDREN'S LEGAL DEFENSE FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

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BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

vs.

JACQUELINE BOUKNIGHT,

Respondent.

MAURICE M.,

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vs.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ of Certiorari to the Maryland Court of Appeals

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society.

In the decision of the Maryland Court of Appeals in this case, an "extravagant extension" of the Fifth Amendment privilege of a suspect was held to override the right of the victim to the protection of the law. This is precisely the kind of tunnel-visioned approach to the criminal law that CJLF was formed to oppose. CJLF therefore has a substantial interest in this case.

SUMMARY OF FACTS AND CASE

On January 23, 1987, three-month-old petitioner Maurice M. was admitted to the hospital with a broken leg. Examination disclosed three previous fractures. Maurice's mother, respondent Jacqueline Bouknight, was observed throwing him into his crib. Petitioner Baltimore City Department of Social Services (DSS) had Maurice placed in foster care, but on July 17 physical custody was returned to Bouknight.

Bouknight later stopped cooperating with DSS, failed to comply with the custody order, and refused to produce Maurice or inform DSS of his whereabouts. The juvenile court awarded custody to DSS and ordered Bouknight to show cause why she should not be held in contempt. At a hearing, Bouknight stated that Maurice was with Bouknight's sister. She made no claim of inability to produce Maurice and no Fifth Amendment objection.[1]

1 This summary of the facts is taken from the majority opinion below *In re Maurice M.*, 550 A.2d 1135, 1136 (Md. 1988), and the dissent, *id.* at 1144-1145.

At a hearing the next day, after it was determined that the sister had not seen Maurice, the court found Bouknight in contempt and ordered her jailed until she produced Maurice or provided information as to his whereabouts. The court rejected repeated self-incrimination challenges to the order on the ground that compliance did not require testimonial communication.[2] The Maryland Court of Appeals (the highest state court) reversed, holding that the act of production was a testimonial communication which could not be compelled under the Fifth Amendment.[3]

The "evidence" which Bouknight has been ordered to produce, Maurice or his body, may very well be incriminating. The "physical evidence" cases, however, establish that there is no privilege to resist a production order on that ground. The act of production itself, on the other hand, is neither testimonial nor incriminating as those terms have been defined in this Court's "act of production" jurisprudence. Bouknight's connection with Maurice is a "foregone conclusion." Her present ability to determine his whereabouts, which she has never denied, does not present a real and substantial possibility of incrimination.

In addition, any person having custody of another person has an obligation to account for that person upon proper demand of the court, regardless of whether such an accounting may be incriminatory. This conclusion is a corollary of the "collective entity rule," and it is necessary to prevent the writ of habeas corpus from being made a dead letter.

2 *Id.* at 1137-1138.

3 *Id.* at 1141.

I. The act of production in this case has little or no testimonial significance.

A. "Private Papers" Cases.

Before 1976, Fifth Amendment objections to subpoenas duces tecum were generally analyzed in terms of whether the evidence sought constituted "private papers" under a combined Fourth and Fifth Amendment analysis. *Boyd* v. *United States*, 116 U.S. 616, 622-623, 633-635 (1886). *Boyd* relied heavily on the fact that but for the evidentiary value of the papers, Boyd had an unqualified right to possess them. *Id.* at 623-624. Thus, the *Boyd* rule did not apply when the right to possession belonged to someone other than the custodian, and that owner had no Fifth Amendment privilege. *In re Harris*, 221 U.S. 274 (1911) (receiver in bankruptcy); *Wilson* v. *United States*, 221 U.S. 361 (1911) (corporation); *Bellis* v. *United States*, 417 U.S. 85 (1974) (small partnership).[4]

B. "Physical Evidence" Cases.

Another line of cases developed the rule that a suspect's cooperation could be compelled so long as that cooperation did not amount to a testimonial communication. In *Holt* v. *United States*, 218 U.S. 245 (1910), the defendant complained that he was coerced into putting on clothing to determine if it fit. Justice Holmes, writing for a unanimous court, dismissed this "extravagant extension of the Fifth Amendment" and emphasized that the privilege is limited to communications. *Id.* at 252-253.

Holt was reaffirmed in *Schmerber* v. *California*, 384 U.S. 757 (1966), in which a drunk-driving defendant was compelled to

4 This line of cases is discussed in more detail in part II, *infra*, at 14-20.

cooperate in giving a blood sample. *Schmerber* rejected the notion that the Fifth Amendment forbids any compelled cooperation in the production of evidence.

> "[S]ince it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.'
>
> "As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest." *Id.* at 762.[5]

In *Schmerber*, the defendant's cooperation was passive. The only requirement was that he not resist. Affirmative cooperation was required in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967).

Wade was required to participate in a lineup and speak for voice identification. 388 U.S. at 220. One of the dissents would have distinguished *Schmerber* on the ground that requiring Wade to speak was "forced cooperation by the accused" prohibited by the Fifth Amendment. *Id.* at 260 (Fortas, J., dissenting in part). Justice Brennan, writing for the majority, rejected this distinction and held, consistently with *Holt*, that nontestimonial, noncommunicative cooperation may be compelled. *Id.* at 222-223. Similarly, in *Gilbert*, *supra*, the defendant was required to give

5 The court went on to say that "the distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764.

handwriting exemplars. The exemplars were held nontestimonial. 388 U.S. at 266-267.

An additional level of suspect cooperation was required in *United States* v. *Dionisio*, 410 U.S. 1 (1973). While the previous cases had involved suspects in custody, Dionisio was subpoenaed by a grand jury to come in and give a voice exemplar. *Id.* at 3. Thus, Dionisio was required to perform an act of production implicitly verifying that he was the person subpoenaed and not an impostor. This Court did not find that difference significant and held that there was "no hint of testimonial compulsion," citing *Wade*, *Gilbert* and *Schmerber*. *Id.* at 7, n. 6. Justice Marshall's dissent did not question that *Wade* and *Gilbert* controlled, but implied that they were wrongly decided. 410 U.S. at 31-32.

C. Fisher, Doe I and Doe II.

Boyd was reexamined and effectively overruled in *Fisher* v. *United States*, 425 U.S. 391 (1976). The *Fisher* court reviewed the history of the *Boyd* rule, *id.* at 405-407, the subsequent developments in Fourth Amendment law, *id.* at 407-408, and the physical evidence cases, *id.* at 408. The Court concluded that the Fourth Amendment "foundations for the rule have been washed away," *id.* at 409, and that "the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person *only* against being incriminated by his *own compelled testimonial communications*," citing *Schmerber*, *Wade* and *Gilbert*. *Ibid.* (italics added).

Fisher then went on to recognize that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." *Id.* at 410. Compliance always involve some minimal concessions such as existence of the evidence and ability to produce it *at the time of compliance*, so "the more

difficult issues [of] whether the tacit averments ... are both 'testimonial' and 'incriminating' ... may instead depend on the facts and circumstances of particular cases...." *Ibid.*

The person claiming the privilege under *Fisher* must show that the testimonial and incriminating aspects of the act of production rise above some threshold. A long line of cases has held that the hazard of self-incrimination must be real and substantial. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Rogers* v. *United States*, 340 U.S. 367, 374 (1951). *Fisher* added a similar threshold requirement to the testimonial aspect, holding that the implicit admissions must "rise[ ] to the level of testimony" to be "within the protection of the Fifth Amendment." *Fisher, supra*, 425 U.S. at 411. Where "the Government is in no way relying on the 'truthtelling' " of the act of production and the implicit concession "adds little or nothing to the sum total of the Government's information" then " 'no constitutional rights are touched. The question is not of testimony but of surrender.' *In re Harris*, 221 U.S. 274, 279 (1911)." *Ibid.*

Because application of the *Fisher* rule is fact-specific, *id.* at 410, an examination of the subpoenas and the surrounding circumstances in *Fisher*, its companion case *United States* v. *Kasmir*, and *United States* v. *Doe*, 465 U.S. 605 (1984)[6] is in order. In *Fisher* (No. 74-18) the documents subpoenaed were analyses by an accountant of taxpayer income and expenses. The taxpayers retrieved the documents from the accountant, apparently as a single bundle, and deposited them with their attorney. *Fisher*, 425 U.S. at 394. In the companion case (No. 74-611), the accountant workpapers relating to a specific client of the attorney were subpoenaed, along with copies of past tax returns, reports

6 Cited below as "*Doe I.*"

of the accountant, and correspondence between the taxpayer and the accountant. *Ibid.*

These subpoenas were reasonably specific. Although they refer to documents by category, the attorneys were not required to make "judgment calls" as to which of the documents in their possession fit the description.

Doe I presented a striking factual contrast to *Fisher*. There were five subpoenas issued. Two of them demanded, among other things, "all records pertaining to four bank accounts." *Doe I*, 465 U.S. at 606. "The third subpoena demanded the production of a list of virtually all of the business records of one of respondent's companies...." *Ibid.* There were 28 categories of documents in all. One category was simply "workpapers." *Id.* at 607, n. 1. Another was "names and home addresses of all partners, associates, and employers." *Ibid.* This is not a document at all, but rather a demand to either compile information or seek out documents on the basis of their content and turn them over. The Court noted that "[t]he subpoenas were drawn in the broadest possible terms." *Id.* at 608, n. 3. The fourth subpoena was similar to the third and added a category of documents which apparently did not exist: the "corporate" organizational documents of a sole proprietorship. *Id.* at 607, n. 2.

The decision upholding the act of production privilege in *Doe I* rests primarily on the explicit finding of the trial court that the act of production would involve testimonial self-incrimination. *Id.* at 613. The present case is easily distinguished on that basis, because the trial court found precisely the opposite. *In re Maurice M.*, 580 A.2d 1135, 1137 (Md. 1988). At present, though, there is little concrete guidance from this Court on what acts of production are testimonial. Without such guidance the Fifth Amendment will be measured by the proverbial chancellor's foot. Simple adoption of the trial court finding without analysis, as the main text of *Doe I* does, would not serve the interest of a uniform administration of justice.

The *Doe I* opinion does shed a little analytical light in the footnotes, however. Quoting the Court of Appeals, the subpoenas are characterized as "broad sweeping" and demanding "myriad documents." There was real doubt about the existence of some of the documents and about "John Doe's" connection to the business entities. *Id.* at 613-614, n. 12. The Court also noted that the Government was not "foreclosed from rebutting respondent's claim by producing evidence that possession, existence, and authentication were a 'foregone conclusion,' " citing *Fisher*. *Id.* at 614, n. 13.

Doe I is thus distinguished from *Fisher* primarily by the breadth of the subpoenas in *Doe* and by the impact of that breadth on the character of the act of production. In reviewing his documents to determine which ones are responsive to the vague subpoena, Doe would have been forced to form thoughts and beliefs on a difficult question and share them with the government. In responding to a demand for nonexistent documents, see *id.* at 607, n. 2, Doe would have had to explicitly state that the documents do not exist. That would be compelled testimony in its pure form.

The latest word on nontestimonial acts is *Doe* v. *United States*, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) ("*Doe II*"). The government asked the district court in that case to order a grand jury target to sign forms directing foreign banks to release information on any accounts the target may have had with those banks. The forms did not identify the banks or accounts, admit that accounts existed, or convey any other information to the government. The district court denied the order on the theory that the form implied existence and control of the accounts and authentication of the records. *Id.* at 2344, 101 L.Ed.2d at 192-193.

After reviewing *Fisher*, *Doe I*, and the physical evidence cases, the Court concluded that the policies of the Fifth Amendment "are served when the privilege is asserted to spare the accused from having to *reveal*, directly or indirectly, *his knowledge* of facts

relating him to the offense or from having to share *his thoughts and beliefs* with the Government." *Id.* at 2349, 101 L.Ed.2d at 199 (footnote omitted, italics added). What is protected from revelation, then is the suspect's knowledge of the facts, not the facts themselves as contained in documents, other chattels, or the body of a human being.[7]

Furthermore, it is the revelation of the knowledge, not the use of the knowledge, that is protected. Doe II and Gilbert were required to draw upon their knowledge of how to write in order to comply with the orders. This distinction appears most sharply in *Curcio* v. *United States*, 354 U.S. 118 (1957). *Curcio* held that a custodian of incriminating documents could not be forced to testify as to their location, *id.* at 128, while reaffirming that he could be compelled to produce them, an act which would necessarily draw upon his knowledge of their location, id. at 122, 127, n. 7.

Justice Stevens, dissenting in *Doe II*, proposed this hypothetical:

> "But can he be compelled to use his mind to assist the prosecution in convicting him of a crime? I think not. He may in some cases be forced to surrender a key to a strong box containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe — by word or deed." 108 S.Ct. at 2352, 101 L.Ed.2d at 203.

Does this contrast illustrate *use* of the mind or revelation of the *contents* of the mind? The strong box owner must use his mind to surrender the key. He must use his knowledge of the

7 That person may be the suspect, as in *Holt*, *Schmerber*, *Wade* or *Gilbert*, or someone else, as in the present case.

location of his key chain and his knowledge of which key fits the strong box. The safe owner, on the other hand, is revealing the contents of his mind. See *id.* at 2347, n. 9, 101 L.Ed.2d at 197 (majority opinion).

The hypothetical can be taken one step further. Could the safe owner be taken to the location of the safe and be compelled to open it while shielding the dial from the guard's view? That act would not reveal the combination, but it would reveal that the owner presently knows the combination. The owner may or may not be protected from that revelation depending on whether that knowledge is genuinely in dispute[8] and whether the fact of that knowledge, as opposed to the contents of the safe, presents a real and appreciable hazard of incrimination. This situation is not really different from that of the strong box key, where the act of production communicates the fact of present possession.

D. The Relevance of Present Possession

The majority opinion below held that production of Maurice would admit Bouknight's present ability to produce him and that this admission would be incriminatory. *In re Maurice M.*, 550 A.2d 1135, 1141 (Md. 1988). This contention raises a question which was settled very soon after the adoption of the Fifth Amendment.

During the proceedings against Aaron Burr for treason, the prosecution wished to introduce a coded letter addressed to Dr. Bollman, allegedly in the handwriting of Burr's secretary, Mr. Willie. Willie refused to answer whether he had copied the

8 That is, whether it is a "foregone conclusion." See *Fisher*, *supra*, 425 U.S. at 411; *Doe I*, *supra*, 465 U.S. at 614, n. 13. It would normally be a foregone conclusion if there is no dispute that the suspect does own the safe and does possess the premises where it is located.

paper. The prosecutor then said, "We will change our question. Do you understand the contents of that paper?" *United States* v. *Burr*, 24 F.Cas. 38, 38 (No. 14,692e, C.C.Va. 1807). He still objected on the ground that knowledge of the code would incriminate him of misprison of treason. *Ibid.*

After "a long desultory argument" by six lawyers over two days, *id.* at 39, Chief Justice Marshall ruled that the answer would not be incriminating.

> "But if the letter should relate to misdemeanor and not to the treason, the court is not apprized that a knowledge and concealment of the misdemeanor would expose the witness to any prosecution whatever. On this account the court was, at first, disposed to inquire whether the letter could be deciphered, in order to determine from its contents how far the witness could be examined respecting it. The court was inclined to this course from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it was put in cipher, or when it was copied by himself; if, indeed, such were the fact. But, on hearing the question more particularly and precisely stated, and finding that it refers *only to the present knowledge of the cipher*, it appears to the court that the question may be answered without implicating the witness, because *his present knowledge would not*, it is believed, in a criminal prosecution, *justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact.*
>
> "The court is, therefore, of opinion that the witness may answer the question now propounded." *Id.* at 40 (italics added).

Burr is squarely on point.[9] Bouknight's present ability to produce Maurice is of little or no probative value in establishing that she had custody of him at the time that he suffered whatever injuries his physical condition may reveal. See *Maurice M.*, *supra*, 550 A.2d at 1146 (McAuliffe, J., dissenting). Her custody of him as of the last day the social worker saw him is a "foregone conclusion." If her defense is that she did not have physical custody at the time of the abuse, her present knowledge will neither justify a contrary inference nor afford the means of proving the contrary.

E. Communication with Counsel.

The Court of Appeals stressed that Bouknight's present incarceration requires her to communicate information to "someone" in order to comply. *Maurice M.*, 550 A.2d at 1141. That someone would quite obviously be the attorney provided for her and paid for by the state. There are two reasons why this does not amount to a Fifth Amendment violation. First, compelled testimony occurs only when a suspect is required to reveal his knowledge, thoughts or beliefs *to the government*. *Doe II*, *supra*, 108 S.Ct. at 2349, 101 L.Ed.2d at 199. The operation of the criminal law

9 The *Burr* opinion does not mention the Fifth Amendment, but that omission is probably based on an assumption that the Amendment simply codified the common law rule.

effectively compels communication *with counsel* all the time. See generally *Geders* v. *United States*, 425 U.S. 80, 88 (1976) (overnight recess case). Any confidential thoughts are protected by the attorney-client privilege. *Fisher*, *supra*, 425 U.S. at 405.

Second, the fact that Bouknight must now produce Maurice through an agent is due solely to her own initial contempt. At the time of the initial order she was not in custody and could have retrieved Maurice herself.[10]

In summary, the act demanded of Bouknight in this case does not rise to the level of incriminating testimony. The only fact which would be communicated by the act of production, other than "foregone conclusions," is the present ability to locate Maurice. That fact does not present a real, substantial danger of incrimination.

II. As guardian of the child, Bouknight has a duty to surrender custody.

The act ordered by the court in this case is something more than the mere disclosure of information. The court has ordered Bouknight to surrender the custody of a human being. Such orders are not unusual in American courts.[11] The claim of self-incrimination privilege is novel only because few have had

10 Bouknight apparently does not claim that production is impossible, only that she cannot produce Maurice without incriminating herself. Brief in Opposition to Petition for Writ of Certiorari at 7-8. If she should claim impossibility at this late stage, the case would be governed by *United States* v. *Rylander*, 460 U.S. 752 (1983).

11 See part IV, *infra*, at 26-28.

the effrontery to raise it. Cf. *United States* v. *Sullivan*, 274 U.S. 259, 264 (1927).

Precedents do exist, however, in cases involving the custody of property. Under circumstances far less compelling than the present case, the rule has evolved that a custodian of property must surrender the property when it is demanded by the government in any case where the government could rightfully demand possession from the owner. This rule applies when the property will incriminate the custodian and even when the act of production has testimonial, incriminatory aspects. The act of production does not have significant testimonial aspects in this case,[12] but even if it did that would not give Bouknight the right to wrongfully keep another person in her custody.[13]

The idea that the Fifth Amendment would provide a privilege to resist a subpoena duces tecum first surfaced in this Court in the case of *Boyd* v. *United States*, 116 U.S. 616 (1886). That case involved a forfeiture action against imported goods. The government subpoenaed an invoice to establish that the goods had been imported illegally. This Court held that such a subpoena for "private papers" violated both the Fourth and Fifth Amendments. However, the Court was careful to distinguish the situation where a court orders the surrender of forfeited or stolen goods themselves.

> "The search for and seizure of stolen or forfeited goods ... are totally different things from a search for

12 See part I, *supra*, at 4-14.

13 Bouknight apparently wishes the court to assume that Maurice is dead. See Brief in Opposition to Petition for Writ of Certiorari at 8. There is, however, no presumption to that effect, Md. Cts. & Jud. Proc. Code § 3-102 (1984), and in the absence of any evidence it would be inhumane to assume that we need not be concerned for his welfare.

and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cælo*. In the one case, the government is entitled to the possession of the property; in the other it is not." *Id.* at 623.

This "entitlement to possession" rationale was the basis for distinguishing *Boyd* in *Wilson* v. *United States*, 221 U.S. 361 (1911). A subpoena had been issued by a grand jury for papers written by a corporation president and in his custody but belonging to the corporation. The president's claim that the papers would incriminate him was rejected.

> "When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *Id.* at 385.

Three weeks later the Court decided another case on the same principle. In *In re Harris*, 221 U.S. 274 (1911), Harris had been ordered in bankruptcy proceedings to deliver his records to a receiver. He claimed that these records would incriminate him of fraudulently obtaining credit. *Id.* at 278-79. His attorney argued that the order required him to deliver incriminating private papers in violation of the Fifth Amendment, citing *Boyd*. *Id.* at 275. Justice Holmes, writing for the Court, quickly dispatched this argument.

> "But no constitutional rights are touched. *The question is not of testimony but of surrender*—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep.... *The right not to be compelled to be*

> *a witness against oneself is not a right to appropriate property that may tell one's story.*" *Id.* at 279-80 (italics added).

If the nature of the papers had been determinative, Harris's argument would have been correct, and *Boyd* would have been controlling. The papers in issue were "personal" as that term was then understood, not corporate. The determining factor was not the nature of the papers but the fact that someone else, not Harris, then had the legal right to possess the papers for reasons entirely separate from the value of the papers as evidence. *The privilege against self-incrimination cannot be used to defeat an independent right of possession.*

The distinction between delivery and testimony was sharply drawn in *Curcio* v. *United States*, 354 U.S. 118 (1957). Curcio was secretary-treasurer of an alleged "phantom union" under investigation by a grand jury. "There were two subpoenas—a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to him in his capacity as secretary-treasurer of Local 269." *Id.* at 119. He failed to produce the records and refused to answer questions about their whereabouts. Although sustaining the objection to the questioning, the Court reaffirmed *Wilson* and *United States* v. *White*, 322 U.S. 694 (1944). *Curcio*, *supra*, at 122-25. The Court explicitly recognized that the failure to produce the records was punishable. *Id.* at 127, n. 7. "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them." *Id.* at 128.

The reasons for what had come to be known as the "collective entity rule" were reviewed in *Bellis* v. *United States*, 417 U.S. 85 (1974). The first reason was the familiar distinction between representative action and individual action. *Id.* at 89-90. There

was also a second reason, however, which is more pertinent to the present case.

"The Court's decisions ... reflect a second, though obviously interrelated, policy underlying the privilege, the protection of an individual's right to a 'private enclave where he may lead a private life.' " *Id.* at 91 (citation and additional quote marks omitted). "Protection of individual privacy was the major theme running through the Court's decision in *Boyd* [citation] and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd*. [Citation]" *Id.* at 91-92. The records of the three-member partnership in *Bellis* were not within the protected zone of privacy because the records were subject to regulation by partnership statutes or agreements and because all partners were generally guaranteed a right of access to the records. *Id.* at 96-99.

Applying *Bellis* to the present case, Bouknight has no legitimate privacy interest in concealing the whereabouts of her abused child. While there certainly are legitimate privacy interests in intrafamily relations, see, *e.g.*, *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977), abuse of children is not one of them. Privacy rights must yield when they conflict with the overriding state obligation to protect the lives of children. *Roe* v. *Wade*, 410 U.S. 113, 163-164 (1973).

The state is entitled to know where Maurice is. Much more importantly, *Maurice* is entitled to the protection of the state, which can only be given if the state knows where he is. In *Bellis* the fiduciary duty of the partner to the partnership and the rights of the other partners to access the records were sufficient to defeat Bellis's *Boyd* claim. 417 U.S. at 98-99. In the present case, the interest of the state in protecting the child and the interest of the child in being protected make a far *more* compelling case that Bouknight has no legitimate interest in concealing his whereabouts.

The Court's Fifth Amendment / subpoena duces tecum jurisprudence took a 90-degree turn in *Fisher* v. *United States*, 425 U.S. 391 (1976). In that case and *United States* v. *Doe*, 465 U.S. 605 (1984)[14] the Court shifted the focus from the nature of the papers to the question of whether the act of production had any testimonial significance.[15] Two questions remained unanswered, however. First, did the privacy rationale of *Boyd* remain valid for intensely private papers such as diaries? See *Fisher, supra,* 425 U.S. at 401, n. 7; *id.* at 415, n. 1 (Brennan, J., concurring in the judgment). Second, did the *White-Bellis* line of cases remain a limitation on the ability of custodians to claim the new act of production privilege?

The latter question was answered in *Braswell* v. *United States*, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). The president of a one-man corporation, as custodian of its records, was required to produce the records notwithstanding the trial court's determination that the act of production was incriminating, in part because "one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of the privilege." *Id.* at 2292, 101 L.Ed.2d at 111, quoting *Fisher, supra,* 425 U.S. at 429-430 (Brennan, J., concurring in the judgment).

The *Braswell* court also quoted the majority opinion in *Fisher*: "in *Wilson* ... and *In re Harris*, ... the custodian of corporate ... books or *those of a bankrupt business* was ordered to respond to a subpoena for the business' books even though doing so involved a 'representation that the documents produced are those demanded by the subpoena,' [citation]." *Braswell, supra*, at 2292,

14 Cited below as "*Doe I*."

15 *Fisher* and *Doe I* are discussed in more detail in part I of this brief at 6-11, *supra*.

101 L.Ed.2d at 111 (emphasis added). The citation to *Harris* in *Fisher*, reaffirmed in *Braswell*, is significant. It indicates that the term "collective entity rule" is underinclusive.

A bankrupt business is not necessarily a collective entity. In addition, the status of a bankrupt debtor is not necessarily a voluntary one. See 11 U.S.C. § 303. What distinguishes the sole proprietor in *Doe I* from the individual debtor in *Harris* is that but for the evidentiary value of "John Doe's" records he had the unqualified, unshared right to possess them. Harris, on the other hand, held his records only for the benefit of the bankrupt estate as soon as he filed bankruptcy. See generally, *Cameron* v. *United States*, 231 U.S. 710, 717 (1914).

Bouknight is in a position analogous to Harris's. She was granted custody of Maurice, but subject to certain obligations. She had the usual obligations of parenthood, see, *e.g.*, Md. Fam. Law Code § 5-203 (1984), and those imposed by the custody order. See J.A. 33. Her custody of Maurice was subject at all times to the authority of the state to demand his return in the event that Maurice's well being so required.

Braswell's duty as a corporate officer required him to deliver documents notwithstanding any incriminatory aspect of the act of production. So did Harris's obligation as the debtor in a bankruptcy proceeding. Can anyone seriously maintain that a parent's duty to account for the well being of a helpless child is any *less* than the obligations of these custodians of mere paper? On the contrary, the sacred trust of parental duty cries out for a far *greater* obligation.

III. The policies underlying the privilege do not support its extension to this case.

Discussions of the policies behind the Self-Incrimination Clause traditionally begin with the famous statement from *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964):

> "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' [Citation]."

Two other discussions of the policy bases of the privilege are worth noting. In 8 Wigmore, Evidence § 2251, 295-318 (McNaughton rev. 1961), Professor McNaughton[16] lists and criticizes a dozen views of the underlying policy. He finds merit in only two and concludes that even these two will support only a much narrower privilege than the one we have. *Id.* at 318. A policy analysis which is much more friendly to the privilege may be found in McCormick, *Evidence* § 118, 286-288 (3rd ed. 1984).

16 This section of Wigmore is a complete rewrite by McNaughton. Wigmore's own views are found in the third edition, 1940, and are summarized by McNaughton in footnote 1 at pages 295-296. See also McNaughton, *The Privilege Against Self-Incrimination, Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. Crim. L., C. & P.S. 138 (1960).

For the purpose of this discussion, we will address the seven *Murphy* reasons.

A. The "Cruel Trilemma."

The first basis of the privilege is "feeling that it is inhumane to force a witness to *choose among the three horns of the triceratops* — harmful disclosure, contempt, perjury." 8 Wigmore, *supra*, at 316 (italics in original). This "trilemma" exists in its pure form only when the answer is demanded under oath, because otherwise lying is not perjury. Even in the station-house interrogation, though, lying is immoral and may be legally punishable. See 18 U.S.C. § 1001.

One possibility is that a person would resolve the trilemma in favor of an involuntary confession, which is said to be "stultifying." See 8 Wigmore, *supra*, at 316. The fact that a person has been compelled to confess rather than reach the point of confession voluntarily is said to interfere with the psychologically necessary process of coming to terms with his own guilt. Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343, 347 (1979).

A second, and more likely, possibility is that the suspect will resolve the trilemma in favor of lying. The unseemliness of forcing a person to violate a sacred oath was probably a powerful reason for the privilege in a more religious age. McNaughton concedes it may retain some validity for the rare devout witness, but he goes on to say that "the prevalence of perjury today leads one to doubt that it is thought of by the average witness as a soul-destroying experience." 8 Wigmore, *supra*, at 317.

Aside from the religious aspect, though, there is something wrong with forcing a person to commit a crime and then punishing him for doing it. See *United States* v. *Grunewald*, 233 F.2d 556, (2nd Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957). Our criminal law recognizes duress and entrapment as

defenses in appropriate cases. See, *e.g. Mason* v. *United States*, 84 U.S. 67, 73 (1873) (duress); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958) (entrapment). The law itself, then, should not force a person to commit perjury.

The danger of forced perjury exists only when there is a substantial possibility of deceit. In the physical evidence cases, deceit is not a real possibility. Schmerber could have submitted to blood testing or refused, but there was no way he could have given false blood. See *Schmerber* v. *California*, 384 U.S. 757, 765 (1966). In voice identification cases, any disguising of the voice would be obvious. See *People* v. *Ellis*, 65 Cal.2d 529, 534-535, 421 P.2d 393, 395-396 (1966) (Traynor, C. J.). In *Fisher*, *supra*, the accountant was readily available to identify his workpapers, and any attempt by the suspect to withhold some of them or substitute forgeries would have been immediately detected. In *Doe I*, *supra*, however, there would have been great opportunity for deceit. When a subpoena demands vaguely defined documents which may or may not exist, there is great temptation to withhold a portion of them and claim that those produced are all that exist. Such a subpoena places great reliance on the veracity of the accused. Cf. *Ellis*, *supra*, 65 Cal.2d at 534.

Thus the question of whether the act of production has significant testimonial, incriminating aspects is closely related to the question of whether deceit is one of the options available to the suspect. If the deceptive third option is not available, then the suspect is faced only with the simple dilemma of compliance or non-compliance and not the "cruel trilemma" denounced in *Murphy*.

As the dissent in the Court of Appeals noted in the present case, the ease of identification precludes a false production. Respondent can produce Maurice or not, but the production of a child who is not Maurice is not an option. *In re Maurice M.*, 550 A.2d 1135, 1146 (Md. 1988) (McAuliffe, J., dissenting).

B. The Accusatorial System, Questionable Confessions and Protection of the Innocent.

The second, sixth and seventh reasons listed in *Murphy* are closely related. We prefer an accusatorial system to an inquisitorial one. The reason we prefer it is that it forces the prosecution to locate other evidence which is more reliable than untrustworthy, self-deprecatory statements, "thus creating an additional assurance that every person convicted is in fact guilty as charged." McCormick, *supra*, at 287.[17]

This policy provides a powerful reason to distinguish between the compulsion of testimony and the compulsion of the surrender of nontestimonial evidence. As Chief Justice Traynor noted in *People* v. *Ellis*, 65 Cal.2d 529, 534, 421 P.2d 393, 395 (1966) the latter "is the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek."[18] As discussed in the previous section, there is no opportunity for exculpatory lying by a guilty person in this situation. Conversely, "a knowing attempt at a false self-incrimination" is also practically impossible. *Id.* at 534, n. 4. When the suspect is merely compelled to surrender custody of a specifically identified object or person, the inquisitorial aspect of the demand vanishes along with the danger of false self-incrimination.

17 "There is a great deal of laziness in [torturing prisoners]. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." 1 J. Stephen, *A History of the Criminal Law of England*, 442 n. 1 (1883).

18 *Ellis* cites *Escobedo* v. *Illinois*, 378 U.S. 478, 488-489 (1964) in a footnote at this point.

C. Inhumane Treatment.

Little need be said on this point in the context of a court order to produce a tangible item. There is no danger of the "third degree" here. See 8 Wigmore, *supra*, at 315. Absent the prosecutor-suspect confrontation which is part of testimony or questioning, there is no danger of browbeating or bullying. See *id.* at 315-316.

D. Fair State-Individual Balance and Private Enclaves.

"[O]ur sense of fair play ... dictates 'a fair state-individual balance by requiring the government to leave the individual alone *until good cause is shown for disturbing him* and by requiring the government in its contest with the individual to shoulder the entire load,' [quoting 8 Wigmore, *supra*]." *Murphy*, *supra*, 378 U.S. at 55 (italics added). Bentham derisively called this the "fox-hunter's reason." 8 Wigmore, *supra*, at 298, n. 2, quoting 7 The Works of Jeremy Bentham 454 (Bowring ed. 1843). In its pure form it does indeed resemble the "sporting theory of justice" derided in our modern discovery jurisprudence. See, *e.g.* *United States* v. *Agurs*, 427 U.S. 97, 108-109 (1976). The theory has merit, though, in the areas where it overlaps with the other rationales.

The government should normally be required to shoulder at least the initial burden, as indicated in the italicized portion of the quotation above, to avoid the "pure 'poking about' fishing expedition" which "under Elizabeth and James amounted to the unlawful process of poking about in the speculation of finding something chargeable." 8 Wigmore, *supra*, at 314. Such unlimited poking would vest an intolerable amount of power in the prosecutor. *Id.* at 315. This is an overlap with the "accusatorial system" rationale. It is wholly inapplicable in a civil proceeding where the information is sought for reasons independent of prosecution. See *id.* at 318.

The second reason for limiting government poking is to preserve the "private enclave." This rationale is also wholly inapplicable to the present case. Whatever privacy rights a parent may have, they certainly must yield to a child's right to life. See p. 18, *supra*.

This leaves only the fox-hunter's theory that in a hypothetical future prosecution of Bouknight for child neglect, child abuse, or murder it would somehow be unfair to have compelled her to produce Maurice or his body. If Maurice is alive no rational person could conceivably contend that any "unfairness" justifies his continued concealment. Even if he is dead, though, does "fairness" really give an accused a license to hide physical evidence? That cannot be. "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1933).

In summary, then, where the "disclosure" sought is the surrender of custody of a human being who was undisputedly in the suspect's custody prior to his disappearance, none of the policies underlying the privilege against self-incrimination provide any support for the claim of privilege.

IV. Acceptance of respondent's position would eviscerate the writ of habeas corpus

In the early 1940's, Sheriff M. Claude Screws of Baker County, Georgia arrested one Mr. Hall, a black man, on a warrant charging theft of a tire. Screws and two other officers then beat Hall to death with a blackjack, committing the crime of violating his civil rights. *Screws* v. *United States*, 325 U.S. 91, 92-93 (1945). See 18 U.S.C. § 242.

What would happen if Bouknight's position were accepted by this Court, a latter-day Sheriff Screws were to commit a similar

crime and hide the body, and the victim's worried relatives were to obtain a writ of habeas corpus for him? Amicus submits that the sheriff could refuse obedience to the writ, citing this case.

The juvenile court in this case ordered respondent to produce in court the body of a human being in her custody. *In re Maurice M.*, 550 A.2d 1135, 1137 (Md. 1988). Although not designated as a writ of habeas corpus, the order commands precisely the same act. See Black's Law Dictionary 638 (5th ed. 1979). The order is a writ of habeas corpus in substance, if not in name.[19] Habeas corpus is not limited to persons in the custody of government agents. The writ may be directed to anyone detaining another person. It has been used in child custody cases in the state and English courts for well over a century. See *Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 510-511 (1982); *In re Richard M.*, 14 Cal.3d 783, 537 P.2d 363 (1975); R. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus*, 453-460 (2nd ed. 1876).

Unquestionably, the creation of a broad new excuse for noncompliance with writs of habeas corpus would be inconsistent with the very foundation of American liberty. See, *e.g.*, A. Hamilton, *The Federalist* No. 84, 511-512 (Rossiter ed. 1961). To recognize the privilege against self-incrimination as an excuse for noncompliance any time the prisoner or his condition would incriminate the custodian would render the writ unavailable in the very cases where it is most necessary. It would be tantamount to a judicial suspension of the writ in violation of the Suspension Clause, U.S. Const. art. I, § 9, cl. 2.

19 "What's in a name? That which we call a rose/ By any other name would smell as sweet." W. Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

Unless the above hypothetical can be distinguished from the present case, this *reductio ad absurdum* demonstrates that Bouknight's argument is flawed. Yet the cases cannot be distinguished. The fact that the custody is private rather than governmental makes no difference. As noted above, the Great Writ is available for persons in private custody. The hypothetical sheriff has certainly not waived his self-incrimination privilege simply by accepting his office. See *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

The applicable principle is the one derived from the document custodian cases, pp. 15-20, *supra*. Just as the privilege "is not a right to appropriate property that may tell one's story," *In re Harris*, 221 U.S. 274, 279-280 (1911), the privilege against self-incrimination can never be used to wrongfully withhold custody of the body of a human being, whether alive or dead.

CONCLUSION

The decision of the Maryland Court of Appeals should be reversed.

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Respectfully submitted,

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